tax duplicates and 64 per cent on the basis of water con
sumption, resulting in apportioning 81.852 per cent of th
cost to the city of Youngstown and 18.148 per cent of th
cost to the city of Niles.

Motions for new trial were filed by the appellants herein

Appellants in cause No. 33549 (Spagnola and other prop
erty owners) appealed to the Court of Appeals from th
order of September 29, 1952, and on December 10, 1952
withdrew their motion for new trial.

While the motions for a new trial of the other appellant
were still pending, the court, on March 10, 1953, entered
an order setting aside the order of September 29, 1952
and ordered the appraisers to submit a second amended
report. Following the filing of such report, the court, on
March 19, 1953, made a further order, in which it approved
the second amended report of the appraisers, allocating 83
per cent of the cost to the city of Youngstown and 17 per
cent of the cost to the city of Niles, and overruled the ex-
ceptions and motions for new trial.

Appeals were thereupon prosecuted by appellant Ohio
Water Service Company from the order of March 19, 1953
(cause No. 33688), and from the order of September 29,
1952 (cause No. 33689).

The city of Niles also appealed separately from each
order. In cause No. 33690, it appealed from the order of
September 29, 1952, and the order of March 19, 1953, over-
ruling its motion for new trial, and in cause No. 33691 it
appealed from the order of March 19, 1953.

The city of Youngstown appealed only from the order
of March 19, 1953.

The Court of Appeals, in each cause, dismissed the ap-
peals for the reason that Section 6602-66, General Code
(Section 6115.37, Revised Code), provides for an appeal

from an award of compensation or damages, or both, but from no other part of the decree of the district court, and that the district court herein made no order pertaining to the awarding of compensation or damages.

The causes are before this court upon the allowance of motions to certify the records of the Court of Appeals.

Mr. Frank C. Dunbar, Jr., Mr. William B. Spagnola and Mr. James E. Mitchell, for appellants in cause No. 33549.

Messrs. Mitchell, Mitchell & Reed and Messrs. Dunbar, Dunbar & Kienzle, for appellant in causes Nos. 33688 and 33689.

Mr. Mitchell F. Shaker, city solicitor, for appellant in causes Nos. 33690 and 33691.

Mr. H. H. Hunt, director of law, and Mr. P. Richard Schumann, for appellant in cause No. 33692.

Mr. W. P. Barnum, for appellee.

Stewart, J.

The sole question of law presented in the present cases is whether the Court of Appeals was in error in dismissing the appeals of appellants from the judgment of the court of the sanitary district, which judgment overruled the exceptions of appellants to the appraisal of benefits in connection with the expansion program of the sanitary district and confirmed such appraisal.

It is urged that the appeals from the judgment of September 29, 1952, should have been dismissed by reason of the action of the district court in setting aside such judgment and entering a new one. However, in our opinion the Court of Appeals properly held that, "when the notice of appeal was filed, if there is a right of appeal, the jurisdictional court (district court) lost its jurisdiction to make further orders in the case," and that the subsequent orders

made by such court could not properly appear in the transcript of such cases upon appeal.

It is urged by appellee that the district court in approving the plan and report of the board of appraisers in these cases was acting in a political and governmental capacity; that the approval by the court of the report of the board of appraisers was political and legislative, was resolved by discretion and opinion, and was not the exercise of a judicial function; and that, therefore, no appeal from the action of the court would lie. However, this court has heretofore held that the General Assembly in delegating functions to the Courts of Common Pleas in reference to the establishment of conservancy and sanitary districts empowered such courts to exercise judicial functions.

In the case of County of Miami v. City of Dayton, 92 Ohio St., 215, 110 N. E., 726, involving the constitutionality of the Miami Conservancy Act, this court held such act to be constitutional, and in the opinion by Wanamaker, J., it was said:

> "Again, it is claimed with much force that the conservancy statute undertakes to delegate legislative power. It is not specifically pointed out just what powers are strictly and wholly legislative, but it certainly cannot be seriously contended that the powers vested in the Court of Common Pleas pertaining to the creation of the district are in any strict sense legislative powers.
>
> "A hearing is involved, a trial upon certain issues made by the petition and the objections thereto, and certain findings must be made by the Court of Common Pleas in that behalf, all of which are essentially judicial in their nature."

In the case of Shook v. Mahoning Valley Sanitary District, 120 Ohio St., 449, 166 N. E., 415, the constitutionality of the act establishing the appellee in the present case was upheld, and similar approval was given as to metropolitan park districts in the case of State, ex rel., Bryant, v. Akron Metropolitan Park District, 120 Ohio St., 464, 166 N. E., 407. In the latter case, in the opinion by Chief Justice Marshall, it was said that the authority delegated to the Probate Courts to determine the extent of territory to be created into a park district is a function in every sense judicial.

From what this court has heretofore declared, it is obvious that the action of the district court in the present cases constituted the exercise of judicial power. The judgment of the district court, constituted of a judge of the Common Pleas Court of Mahoning county, a judge of the Common Pleas Court of Trumbull county, and a judge of the Common Pleas Court of Belmont county, designated by the Chief Justice of the Supreme Court in accord with Section 6602-35, General Code (Section 6115.04, Revised Code), being in the exercise of judicial power, appeals therefrom are controlled by the provisions of Section 12223-3, General Code (Section 2505.03, Revised Code,) which reads as follows:

> "Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, tribunal, or commission may be reviewed as herein provided, unless otherwise provided by law, except that appeals from judgments of justices of the peace upon questions of law and fact, shall be taken in the manner now provided for in General Code Sections 10382 to 10389, inclusive."

Section 6 of Article IV of the Constitution gives Courts of Appeals "such jurisdiction as may be provided by law

to review, affirm, modify, set aside, or reverse judgments or final orders * * * of courts of record inferior to the Court of Appeals," and under the above-quoted statute appellants insist that they have a right of appeal to the Court of Appeals, whereas appellee contends that there is no right of appeal because of the term in the statute, "unless otherwise provided by law."

That brings us to a consideration of Sections 6602-65 and 6602-66, General Code (Sections 6115.36 and 6115.37, Revised Code).

Section 6602-65, General Code, reads in part:

"If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm the appraisers' report as so modified and amended, and **such findings and appraisals shall be final and incontestable.**" (Emphasis added.)

Section 6602-66, General Code, reads in part as follows:

"Any person, or public or private corporation desiring to appeal from an award as to compensation or damages, shall within ten days from the judgment of the court confirming the report of the appraisers, file with the clerk of the court a written notice making demand for a jury trial. * * *

"The appeal shall be from the award of compensation or damages, or both of them, but from no other part of the decree of the court.

"In case more than one appeal is entered from the awards as to compensation or damages in the same county, the court may, upon a showing that the same

may be consolidated without injury to the interests of anyone, consolidate and try the same together."

Appellants argue that the phrase, "such findings and appraisals are final and incontestable," means simply that such findings bind the parties thereto and that such parties can not claim after final adjudication that the findings are not res judicata.

It seems to us, however, that such emphatic words as "final and incontestable," without any modification or restriction, mean just what they say and are all inclusive.

Appellants contend that the language," the appeal shall be from the award of compensation or damages, or both of them, but from no other part of the decree of the court," means that no appeal can be had from any other part of the decree of the court with reference to compensation or damages but does not preclude an appeal from a decree of the court which has no reference to compensation or damages. There might be plausibility in this contention if it were not for the final and incontestable provision, and that language precludes an appeal by parties, such as appellants, to the Court of Appeals. As a matter of fact, the appeal from the award of compensation or damages contemplates only a right to a jury trial in reference to such compensation or damages and not an appeal to the Court of Appeals.

This court has decided many times that there is no inherent right of appeal from a judgment of a court and that such right must be conferred by constitution or statute. City of Middletown v. City Commission of Middletown, 138 Ohio St., 596, 603, 37 N. E. (2d), 609; Lindblom v. Board of Tax Appeals, 151 Ohio St., 250, 85 N. E. (2d), 376; Corn v. Board of Liquor Control, 160 Ohio St., 9, 113 N. E. (2d), 360.

Sections 6602-65 and 6602-66, General Code, making final and incontestable the determination by the court confirming the report of the board of appraisers with reference to benefits and providing an appeal only with reference to an award of compensation or damages, or both, prohibit any appeal to the Court of Appeals from a sanitary district court.

Appellants argue that prohibiting an appeal is not contemplated in the language, "otherwise provided by law," as found in Section 12223-3, General Code, but we can not concur in that claim. If a right of appeal is granted by a general statute which provides that there may be an appeal unless otherwise provided by law, and a special statute referring to special cases prohibits an appeal with reference to such cases, that special statute provides otherwise by law as to the general right of appeal in the general statute.

Appellants contend further that Section 6602-68, General Code (Section 6115.39, Revised Code), sanctions their right of appeal to the Court of Appeals. That section provides:

> "Upon the entry of the order of the court approving the report of the appraisers, as provided for in this act, the clerk of said court in which the same is entered shall transmit a certified copy of the said decree, and of the appraisals as confirmed by the court, except those parts from which appeals have been perfected but not determined, to the secretary of the district. When any appeal has been finally determined, the clerk of that court shall certify the amount of each item of the judgment to the clerk of the court having the original case, who shall file the same therein and thereupon transmit certified copies of the same as in this section above provided."

The argument of appellants is to the effect that the perfection of appeals being contemplated in the foregoing statute, the General Assembly must have intended them to have a right of appeal. However, provision is made in Section 6602-70, General Code, for an appeal by the board of directors of a sanitary district "from any order of the Court of Common Pleas made in any proceedings under this act, not requiring the intervention of a jury," and the appeals referred to in Section 6602-68, General Code (Section 6115.39, Revised Code), are the appeals authorized under Section 6602-70, General Code.

Since under the Sanitary District Act the approval by the district court of findings and appraisals of the board of appraisers is final and incontestable except as to an award of compensation or damages, concerning which there is an appeal having a trial by jury, since there is no right of appeal as to other parts of the decree of the court, and since the Sanitary District Act contains no other authorization for appeal, except that given to the board of directors under Section 6602-70, General Code, we are forced to the conclusion that the Court of Appeals had no jurisdiction to consider the appeals in the present causes, and, therefore, its judgment must be affirmed.

Judgments affirmed.

Weygandt, C. J., Middleton, Taft, Hart, Zimmerman and Lamneck, JJ., concur.

APPLICATION FOR REHEARING.

[Filed April 14, 1954.]

(The following application for rehearing was filed in both Cases Nos. 33688 and 33689.)

The Ohio Water Service Company, appellant in causes numbers 33688 and 33689, decided March 31, 1954, respectfully files this application for a rehearing of such causes, pursuant to Rule XX of this court, on the ground and for the reason that the decision of this court in these causes reveals an unconstitutional denial of the equal protection of the laws to appellant, under both Article I, Sec. 2 of the Ohio Constitution, and the Fourteenth Amendment to the Constitution of the United States.

The primary question before this court in these causes was whether an appeal might be taken by appellant, a property owner within the Mahoning Valley Sanitary District, from the orders of the Sanitary District Court created by the Sanitary District Act. In finding that no appeal would lie, this court's construction of those sections of the Act dealing with such appeals was that "the appeal referred to in Section 6602-68, General Code (Section 6115.37, Revised Code) are the appeals authorized under Section 6602-70, General Code", and "* * * the Sanitary District Act contains no other authorization for appeal, except that given the board of directors under G. C. 6602-70 * * *".

It appears clear that under this construction of Sec. 6602-70, G. C., the board of directors, who are the public officials appointed to administer the district and determine its course of action, can take an appeal from the orders of the Sanitary District Court upon the judicial hearing on exceptions to the appraisers' report, which orders gave rise to this cause, but no such appeal can be taken by the

appellant or any other adversary party to such hearing. We respectfully submit that such discrimination sets up an unconstitutional denial of the equal protection of the laws.

This specific question of allowing an appeal to one party and denying it to another was not treated in the briefs of any of the parties to this case, or its companion cases, nor was it raised, to the best recollection of counsel for the Ohio Water Service Company, upon oral argument. Counsel for appellee made no such allegation in his brief and appellant did not anticipate the necessity of referring to the point, about which there appeared to be no controversy. Since this constitutional question is such a fundamental issue, appellant respectfully requests that this court reconsider the question of the right of appeal under the Sanitary District Act and grant counsel for all parties an opportunity to study and present arguments on this new issue.

In view of the finding of this honorable court with regard to the unilateral right of appeal of the board of directors, counsel have examined the question at length, and respectfully offer an outline of the law as found by them, for the information and guidance of this court in considering this application.

Because of the recognition by the legislatures of the constitutional provisions relating to equal protection of the laws, relatively few attempts to permit unilateral appeals have come before the courts. However, a sufficient body of decisions has grown up to clearly indicate the constitutional protection against such unfair discrimination.

In Missouri v. Lewis, 101 U. S., 20, 25 L. Ed., 989 (1879), the Supreme Court of the United States, in holding that a state legislature could properly vary the system of

courts and procedure in various parts of the state, set out the following interpretation of the application of the equality clause to judicial procedure, at pages 30 and 992, respectively:

> "It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of the citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction as to equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases, and under like circumstances, to resort to them for redress."

The highest courts of a number of states have invalidated statutes where the right of appeal was either restricted or prohibited with respect to one party while allowed to another party to the same controversy. Funkhouser et al. v. Randolph et al., 287 Ill., 94, 122 N. E., 144 (1919), is a case very much in point, and the facts and questions presented were virtually the same as appear in these causes. The Supreme Court of Illinois, in construing the Drainage Act of Illinois, creating drainage districts much like our sanitary district, held at pages 105 and 148, respectively:

> "By the further provisions of section 8, if the court shall find the facts against the petitioners the court shall dismiss the petition at the cost of the petitioners, and any interested party may have the cause reviewed by this court by appeal or writ of error, but there is

no provision to the effect that any findings of fact shall be conclusive on such appeal or writ of error against the petitioners. The restrictions on such appeal or writ of error on the review of the facts found are only against the defendants in case the finding is against them. Unilateral restrictions of this character on the right of review are repugnant to the constitutional provisions guaranteeing every person equal protection of the law. Every citizen has a right, under such guaranties, to insist that his rights of life, liberty and property shall be determined by the same rules which settle and determine similar rights of others. Green v. Red Cross Medical Service Co., 232 Ill., 616."

This case was cited approvingly by the United States Supreme Court in the great case of Truax v. Corrigan, 257 U. S., 312, at page 339. That decision contains an excellent statement of the equal protection of the laws doctrine at pages 332 through 339. We shall not attempt to paraphrase the discussion by Chief Justice Taft found there, but commend it to this court.

In the case of State ex rel. Owen v. Wisconsin-Minnesota Light & Power Co., 154 Wis., 430, 162 N. W., 433 (1917), the Supreme Court of Wisconsin held unconstitutional a statute granting the right of appeal from the orders of the Railroad Commission to certain public and semi-public bodies and parties but denying this right to all other parties adversely affected by the orders of the commission. This, we submit, is precisely the situation existing under the Sanitary District Act as construed by this court. The court said, at pages 432 and 434, respectively:

> "Here the defendant is not only denied due process of law but it is denied the equal protection of the laws inasmuch as the statute gives the right of appeal to certain specified parties and denies it to others without any apparent valid basis for such classification."

Although no case appears to have arisen in the state of Ohio in which the question of the right of unilateral appeal was presented, the courts of this state approved the law as stated in the decisions cited above. In Wilms v. Klein, 38 O. L. A., 45, the Court of Appeals for the First District properly held that the fact that an appeal would lie from a final order overruling a motion for judgment notwithstanding the verdict did not require the granting of an appeal from an interlocutory order overruling a motion for a new trial. In so finding the court referred to Hecker v. Illinois Central Railway Company, 231 Ill., 574, 83 N. E., 456, which held a statute unconstitutional that allowed one party an appeal from an adverse decision and denied it to the other, and made the following statement:

> "All that these cases decided, as we understand them, was that a statute that gave a right of appeal to one litigant and denied it to another would be 'special legislation and obnoxious to the constitution.' Of course, if it had been attempted to give one litigant a right of appeal from an order overruling his motion for judgment and denied to the other the right to appeal from a similar motion filed by him, the attempt would fail because of the requirement of the 'equal protection' of the law, which means 'the protection of equal laws' for all those similarly situated."

The Supreme Court of Ohio has ruled that there may be no discrimination between persons or classes respecting the right to appeal. In Hocking Valley Coal Company v. Rosser, 53 O. S., 12 (1895), this court held unconstitutional a statute which imposed certain costs on one party to an appeal but not on the other. This court said, on page 24:

> "We do not think that the General Assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights."

We submit that the situation existing in these causes is an a fortiori example of denial of equal protection of the laws, for under the statute found unconstitutional in the Hocking Valley Coal Company case, both parties had a right to appeal the lower court's judgment, although one of them was placed under a financial handicap, while under the provisions of Section 6602-70, G. C., as construed by this court, one of the parties to a judicial proceeding is absolutely forbidden the right of appeal under any circumstances.

Appellant's research has unearthed only one case where a statute granting a unilateral right of appeal was upheld as constitutional. In Superior Wheeler Cake Corporation v. Superior Court of California, in and for Los Angeles County, 203 Cal., 384 (1928), 264 Pacific, 488, the court held that a statute providing for an appeal by the defendant, but not by the plaintiff, from the decision of the statutory small-claims court was constitutional and did not violate the equal protection of the laws doctrine. The opinion of the court is summed up as follows, at pages 387 and 489, respectively:

> "Thus, it will be seen that a quick and inexpensive method of trial and judgment is provided largely in the interest of complaining plaintiffs; that the right of jury trial is denied the defendant in such cases and service by mail upon him is deemed sufficient without actual personal notice. * * * If the plaintiff does not feel that he will be benefited by the procedure, he has the alternative of entering the regular jurisdiction of the justice's court, where the right of appeal is equal and reciprocal. Having this unmistakable choice in the premises, we fail to find discrimination within the meaning of any of said constitutional provisions. The advantage voluntarily accepted must be held a complete compensation for the loss of the right to appeal."

Other decisions, not involving unilateral rights of appeal, have held valid statutes granting one party access or favorable treatment in the courts to the exclusion of the other party, but in all such cases, the courts found extenuating circumstances which required special treatment in order to maintain the equal protection of the law to the parties concerned. For example, see Bloch v. Hirsh, 256 U. S., 135, 65 L. Ed., 865 (1921) and Barrington v. Barrington, 266 Ala., 192, 89 Southern, 512 (1924).

Appellant does not claim that under certain, limited conditions, the statutes cannot constitutionally permit a right of appeal by one party, while denying it to the other. The right of a defendant in a criminal action to appeal where such appeal is denied to the state in the same action, is granted in nearly every jurisdiction. In our own state of Ohio, the legislature has denied to the Industrial Commission the right to appeal from an award granted a claimant, although leaving such right of appeal open to the claimant under specified circumstances. Appellant wishes to point out that in all situations such as those referred to above, the restriction is on appeals by the state and not on appeals by the individual. A denial by a state to itself of certain defenses which it might have used, in the exercise of its sovereign powers, does not create any constitutional question, since the effect of such denial is to increase the opportunities for fair treatment to all persons within its jurisdiction. However, a diametrically opposite result is reached in the Sanitary District Act, for there the agency of the state is favored at the expense of the people, since it is granted a right of appeal from an adversary proceeding while interested property owners of the state, who are also parties to such proceedings, are denied such right.

In passing, it might be noted that the Ohio Workmen's Compensation Act does not contain any exception to the general rule holding unilateral rights of appeal unconstitutional. The employer insured under that act has no standing to claim a right of appeal from awards to his employees by the Industrial Commission, as he is not a party to the proceeding wherein compensation is allowed. The employer, upon contributing to the fund, has relieved himself of any obligation to pay compensation for injuries, and no longer retains any interest in the disbursement of funds by the commission. Copperweld Steel Company v. Industrial Commission of Ohio, 143 O. S., 591. While the same restriction as to appeal from an award by the commission applies to a nonconforming employer, his constitutional guarantees are protected as he may raise all questions relating to the award at the time he is sued for the compensation fixed by the commission.

An enlightening statement as to what constitutes proper classification within the equal protection of the laws doctrine is found at page 417 of Southern Railway Company v. Greene, 216 U. S., 400, 54 L. Ed., 536 (1909):

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification (citing cases)."

Appellant submits that no reasonable classification exists whereby the board of directors of the Mahoning Valley Sanitary District can properly be given a right of appeal from the decisions of the Sanitary District Court, while

such right of appeal is forbidden to property owners who are parties, with the board of directors, to proceedings before such court.

The appellant also desires to call this honorable court's attention to the fact that the Sanitary District Court, in those orders from which this court says no appeal exists, included determinations of a number of matters which cannot be classified as either an appraisal of benefits or of damages, and which could not, under Sec. 6602-64 and 6602-65 G. C. (Sec. 6115.35 and 6115.36 Revised Code), be properly considered at the hearing on exceptions to the sanitary district appraisal record. For instance, the court of jurisdiction ruled on disposition of surplus funds of the district; the cancellation of delinquent assessments; ordered that certain areas not be included in the district; and approved the nonappraisal of benefits to outlying areas which admittedly will benefit from the new improvements. Are the decisions of the court of jurisdiction final and incontestable on these matters because of their inclusion in the order confirming the report of the board of appraisers? Is that part of each order of the court of jurisdiction relieving certain benefited areas from appraisal and special assessment unappealable even though it is clearly contrary to the Fourteenth Amendment to the Constitution of the United States, forbidding the levying of special assessments for the entire cost of a public improvement against only part of the lands which will be specially benefited thereby? Norwood v. Baker, 172 U. S., 269, 43 L. Ed., 443 (1898); Myles Salt Co. v. Board of Commissioners, 239 U. S., 478, 60 L. Ed., 392 (1916).

Conclusion.

We realize and appreciate the consideration which this court has given to all points raised by counsel for all parties to these causes, but in light of the grave constitutional question raised by this court's decision in these causes, and particularly because this very essential point regarding the validity of the entire sanitary district act has never been briefed or argued by any of the parties to these causes, or by any other persons, to appellant's knowledge, we respectfully request a reconsideration of this decision.

Respectfully submitted,
MITCHELL, MITCHELL & REED,
DUNBAR, DUNBAR & KIENZLE,
Attorneys for Appellant.

Of Counsel:
JAMES E. MITCHELL,
FRANK C. DUNBAR, JR.

TRANSCRIPT OF DOCKET ENTRIES, SUPREME COURT OF OHIO.

(Cases Nos. 33688 and 33689.)

(The docket entries in Cases Nos. 33688 and 33689 are identical.)

1953, August 12. Notice of appeal, motion for an order to certify record, assignments of error, appellant's brief on motion and proof of service filed.

1953, August 13. Bill of exceptions (5 Vol.) and exhibits filed.

1953, August 14. Leave to file appellee's brief to September 20, 1953, filed.

1953, August 24. Court of Appeals' transcript and original papers filed.

1953, September 24. Leave to file appellee's brief instanter filed.

1953, September 24. Appellee's brief and proof of service filed.

1953, October 2. Three additional copies of appellee's brief filed.

1953, October 7. Motion by appellee to consolidate filed.

1953, October 7. Motion by appellee to advance for hearing filed.

1953, October 13. Motion by appellee to dismiss appeal as of right filed.

1953, November 4. Motion by appellee to dismiss appeal as of right sustained.

1953, November 4. Motion for an order directing the Court of Appeals of Mahoning county to certify its record allowed.

1953, November 4. Dismissed, no debatable constitutional question involved.

1953, November 4. Order No. 2886 issued to clerk of courts to certify record.

1953, November 12. Assignments of error filed. 11/16/53, P. S. filed.

1953, November 12. Court of Appeals' transcript, original papers and bill of exceptions refiled.

1953, November 12. Cause docketed on its merits.

1953, November 14. Certificate of Court of Appeals filed.

1953, November 23. Original papers taken by Rodenfels. 12/15/53 returned.

1953, December 10. Printed record (same as 33689) and A. of S. filed. 12/12/53. P. S. filed.

1953, December 22. Appellant's printed brief and A. of S. filed. 12/28/53 P. S. filed.

1954, January 4. Printer's receipted bill filed.

1954, January 20. Printed brief of Mahoning Valley Sanitary District filed and P. S. filed.

1954, February 10. Entry extending time for filing reply brief to February 20, 1954.

1954, February 20. Appellant's reply brief filed.

1954, February 27. Additional authorities of appellant filed. P. S. filed.

1954, March 31. Judgment affirmed.

1954, April 6. Notified application for rehearing to be filed.

1954, April 8. Original papers, bill of exceptions, sent to clerk.

1954, April 14. Application for rehearing filed.

1954, April 21. Rehearing denied.

1954, April 21. Mandate issued.

1954, May 21. Precipe for transcript of record filed.

TRANSCRIPT OF JOURNAL ENTRIES. SUPREME COURT OF OHIO.

(Cases Nos. 33688 and 33689.)

(The journal entries in Cases Nos. 33688 and 33689 are identical.)

Entry Dismissing Appeal as of Right.

November 4, 1953. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Mahoning county, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

Entry Extending Time For Filing.

February 10, 1954. Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed reply brief herein be, and the same hereby is extended to February 20, 1954.

Entry Affirming Judgment of the Court of Appeals.

March 31, 1954. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Mahoning county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Common Pleas of Mahoning county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Mahoning county, "for entry".

Entry Denying Application For Rehearing.

April 21, 1954. Upon consideration of the above application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.

EXHIBITS.

(The following exhibits were made a part of the record in the hearing on exceptions held January 21, 1952, before the Common Pleas Court.)

Ohio Water Service Company Exhibit A.

Mahoning Valley Sanitary District

1952 Daily Average of Sanitary District Water supplied to member cities and to the Village of McDonald

Youngstown	22,752,361	gal. per day
Niles	5,044,820	gal. per day
McDonald	796,000	gal. per day
*Total Output	28,593,181	gal. per day

Note *—It should be noted 1952 output was affected by the steel strike.

Average use of Sanitary District Water Outside the District in Gallons per Day during 1952

Youngstown Industrial		903,234	
Domestic & Fire Protection	(a)	959,805	1,863,039 GPD

Niles			
Industrial	(b)	1,664,732	
Domestic & Fire Protection	(c)	72,600	1,737,332 GPD
McDonald			
Industrial			
Domestic & Fire Protection			796,000 GPD
Total Outside Boundaries of the District			4,396,371 GPD

Note (a) Consumption for 1952 based on 10% increase over 1950 actual; as this is the growth area with large amount new construction.

Note (b) Niles industrial consumption is based on allocating Republic Steel Plant as 50% inside and 50% outside.

Note (c) Niles domestic and fire protection use outside based on 550 consumers @ 120 GPD.

1952 Industrial Use of M.V.S.D. water based on analysis of last four quarterly billings, but excluding McDonald

Youngstown			
Inside Corporation			
Billings	7,358,125		
10% Line Loss & Meter Slippage	735,813	8,093,938	
Outside Corporation			
Billings	821,122		
10% Line Loss & Meter Slippage	82,112	903,234	8,997,172 GPD
Niles			
Inside Corporation			
Billings	1,875,133		
10% Line Loss & Meter Slippage	187,513 (a)	2,062,646	

Outside Corporation Billings	1,513,393		
10% Line Loss & Meter Slip-Industry	151,339 (a)	1,664,732	3,727,378 GPD
Total Sanitary District Water going to Industry			12,724,550 GPD
Percentage Used by Industry			44.62%

Ohio Water Service Company Exhibit B.

1952 Tax Valuation of Areas Served by Mahoning Valley Sanitary District

	Amount	Tax Valuation	Percent
Youngstown Area Served			
Inside Sanitary District	361,448,430		
Outside Sanitary	66,127,550	427,575,980	88.74%
Niles Area			
Inside Sanitary District	36,308,730		
Outside Sanitary District	4,295,550	40,604,280	8.43%
McDonald		13,650,000	2.83%
Total Area Served		481,830,260	100.00%

Note: All of the foregoing matter has been certified as part of the record in this cause by the clerk of the Supreme Court of Ohio.

CONSTITUTION OF THE STATE OF OHIO.

Article IV, Sec. 2, 11 Page's Ohio General Code Annotated, 1952 Supp. 24. **"The supreme court.** * * * It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * *"

(Other portions of this section of the constitution are not pertinent to this cause and are, therefore, omitted.)

STATUTES OF THE STATE OF OHIO.

Ohio General Code, Section 6602-41, 5 Page's Ohio General Code Annotated 77 (Ohio Revised Code, Section 6115.10.) **Appointment of director; qualifications; vacancy.** Within thirty days after entering the decree incorporating said district, providing said district is wholly within one county, the court shall appoint one person who shall be a resident freeholder within the district as a director of the district for a term of five years from the date of his appointment. Provided further that in case said district is composed of more than one county, or part thereof, then each county shall be entitled to one director who shall be a resident freeholder of such county. In no event shall there be more than one director for each county. The court shall fill all vacancies which may occur in the office of director or directors.

Ohio General Code, Section 6602-58, 5 Page's Ohio General Code Annotated 82 (Ohio Revised Code, Section 6115.29). **Appointment of appraisers; qualifications, powers and duties.** At the time of making its order organizing the district or at any suitable time thereafter, either in term or in vacation, the court or judge shall appoint three appraisers, who shall in every case where appraisers are appointed under this act [G. C. §§6602-34 to 6602-106] be recommended by the board of directors, and whose duty it shall be to appraise the lands or other property within and without the district to be acquired for rights of way, reservoirs and other works of the district, and to appraise all benefits and damages accruing to all lands within or without the district by reason of the execution of the official plan. Said appraisers shall be freeholders residing within the State of Ohio, who may or may not own lands within said district. Provided further that no two of said appraisers shall be residents of the same county. Each of the appraisers shall, before taking up his duties, take and subscribe to an oath that he will faithfully and impartially discharge his duties as such appraiser, and that he will make a true report of such work done by him. The said appraisers shall at their first meeting elect one of their own number chairman, and the secretary of the board of directors or his deputy shall be ex officio secretary of said board of appraisers during their continuance in office. A majority of the appraisers shall constitute a quorum, and a concurrence of the majority in any matter within their duties shall be sufficient for its determination. Said appraisers shall continue to hold their offices until excused by the court, and the court shall fill all vacancies in the board of appraisers, or may appoint a new board for subsequent appraisals, as occasion may require. Such new

board, if appointed, shall fill all the requirements of the board of appraisers of the district, and perform its duties.

Ohio General Code, Section 6602-60, 5 Page's Ohio General Code Annotated 83 (Ohio Revised Code, Section 6115.31). **Appraisement of benefits and damages to lands outside district. Land affected outside district.** If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, they shall appraise the benefits and damages to such land, and shall file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district.

Ohio General Code, Section 6602-64, 5 Page's Ohio General Code Annotated 84 (Ohio Revised Code, Section 6115.35). **Hearing on appraisals; filing exceptions.** Any property owner may accept the appraisals in his favor of benefits and of damages and of lands to be taken made by the appraisers, or may acquiesce in their failure to appraise damages in his favor, and shall be construed to have done so unless he shall within ten days after the last publication provided for in the preceding section file exceptions to said report or to any appraisal of either benefits or damages or of land to be taken which may be appropriated. All exceptions shall be heard by the court beginning not less than twenty nor more than thirty days after the last publication provided for herein, and determined in advance of other business so as to carry out, liberally, the purposes and needs of the district. The court may, if it deem necessary, return the report to the board of appraisers for their further con-

sideration and amendment, and enter its order to that effect. If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon. But the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll when the order of the court specifies the precise character of the changes thereof.

Ohio General Code, Section 6602-65, 5 Page's Ohio General Code Annotated 84 (Ohio Revised Code, Section 6115.36). **Decree on appraisals.** If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm said appraisers' report as so modified and amended, and such findings and appraisals shall be final and incontestable. In considering the appraisals made by the board of appraisers, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. In case the court shall find that the estimated benefits appraised are less than the total costs of the execution of the official plan, exclusive of interest on deferred payments, or that the official plan is not suited to the requirements of the district, it may at its discretion return said official plan to the directors of the district with the order for them to prepare new or amended plans, or it may disorganize the district after having provided for the payment of all expenditures.

Ohio General Code, Section 6602-69, 5 Page's Ohio General Code Annotated 85 (Ohio Revised Code, Section 6115.40). **Power to alter or add to official plan; procedure.** The board of directors may at any time, when necessary

to fulfill the objects for which the district was created, alter or add to the official plan, and when such alteration or additions are formally approved by the board, by the state department of health, and by the court, and are filed with the secretary, they shall become parts of the official plan for all purposes of this act. Where such alterations or additions in the judgment of the court neither materially modify the general character of the work, nor materially increase resulting damages for which the board is not able to make amicable settlement, nor increase the cost more than ten per cent, no action other than a resolution of the board of directors and approved by the state department of health shall be necessary for the approval of such alterations or additions. In case the proposed alterations or additions materially modify the general character of the work or materially modify the resulting damages or materially reduce the benefits, for which the board is not able to make amicable settlement, or materially increase the benefits in such a manner as to require a new appraisal, or increase the cost more than ten per cent, the court shall direct the board of appraisers (which may be the original board, or a new board appointed by the court on petition of the board of directors or otherwise), to appraise the property to be taken, benefited or damaged, by the proposed alterations or additions. Upon the completion of the report by the board of appraisers, notice shall be given and a hearing had on their report in the same manner as in the case of the original report of the board of appraisers, and the same right of appeal to a jury shall exist. Provided: That where few land owners are affected, the clerk of the court may, on order of the court, if found to be more economical and convenient, give personal notice of the pendency of the report of said appraisers, instead of notice by

publication; and Provided: That when the only question at issue is additional damages or reduction of benefits to property, due to modification or additions to the plans, the board of directors may, if they find it practicable, make settlements with the owners of the property damaged, instead of having appraisals made by the board of appraisers. In case such settlements are made, notice and hearing need not be had. After bonds have been sold, in order that their security may not be impaired, no reduction shall be made in the amount of benefits appraised against property in the district, but in lieu of such reductions of benefits, if any are made, the amount shall be paid to the party in cash. This provision shall apply to all changes in appraisals under this act [G. C. §§6602-34 to 6602-106].

Ohio General Code, Section 6602-70, 5 Page's Ohio General Code Annotated 86 (Ohio Revised Code, Section 6115.41). **Appeal shall not delay proceedings; waiver.** No appeal under this act [G. C. §§6602-34 to 6602-106] shall be permitted to interrupt or delay any action or the prosecution of any work under this act, except where the party appealing is entitled to a jury under the constitution of the state, and such jury trial has not been had; in which case, only so much of the work shall be interrupted or delayed as would constitute a taking of or a damaging of the property of the appellant. The board of directors of any district organized under the terms of this act shall have the right to appeal from any order of the court of common pleas made in any proceedings under this act, not requiring the intervention of a jury. The failure to appeal from any order of the court in any proceedings under this act within the time specified herein shall constitute a waiver of any irregularity in the proceedings, and the remedies provided for in this act shall exclude all other remedies except as herein provided.

Ohio General Code, Section 6602-77, Page's Ohio General Code Annotated 88 (Ohio Revised Code, Section 6115.48). **Assessment for bond fund; additional levies.** After the list of real property, with the appraised benefits as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the district, then from time to time, as the affairs of the district demand it, the board of directors shall levy on all real property, upon which benefits have been appraised, an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the execution of the official plan including superintendence of construction and administration, plus ten per cent of said total, to be added for contingencies, but not to exceed, in the total of principal, the appraised benefits so adjudicated.

Apportionment of assessment. The said assessment shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised, and not in excess thereof, and in case bonds are issued as provided herein and hereafter, then the amount of interest, which will accrue on such bonds, as estimated by said board of directors, shall be included in and added to the said assessment, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvement are or are not equal to or in excess of the benefits appraised.

(The remaining portion of §6602-77 is not pertinent to this cause and is therefore omitted.)

Ohio General Code, Section 12223-29, 9 Page's Ohio General Code Annotated 513 (Ohio Revised Code, Section 2505.29). **No appeal filed without leave of supreme court;**

exceptions. Except as to the judgment or final order of the court of appeals or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, and in cases which originated in the court of appeals and except as to proceedings of administrative officers as may be provided by law, no appeal shall be filed in the supreme court, in cases over which it has jurisdiction, without its leave, or that of a judge thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 223.

OHIO WATER SERVICE COMPANY,
Petitioner,

vs.

THE MAHONING VALLEY SANITARY DISTRICT,
Respondent.

BRIEF OF THE MAHONING VALLEY SANITARY DISTRICT OPPOSING CERTIORARI.

ESSENCE OF THE DISTRICT'S RESPONSE.

The respondent, The Mahoning Valley Sanitary District, maintains that the record does not justify consideration of the merits of the federal questions which the petitioner purports to present; and that the Supreme Court of Ohio did not decide the appeal to it in a way contrary to applicable decisions of this Court. Only a question of Ohio state court procedure, based upon Ohio statutes, was decided by the Supreme Court of Ohio. The claim that such statutes grant unjustifiable unilateral rights of appeal is not now presentable.

Proper analysis of the record will furnish a basis only for a single question, if any, i.e. as to whether the Constitution of the United States guarantees that litigants in state courts shall have rights of appeal after trials in courts of original jurisdiction. This Court has many times answered in the negative.

MAJOR PROCEDURAL FACTS.

Respondent, The Mahoning Valley Sanitary District, was formed in 1926 under the Sanitary District Act of Ohio (108 Ohio Laws 634; Ohio Revised Code, Sections 6115.01 to 6115.99) and thereupon became "a political subdivision and public corporation of the state." (Ohio R. C. 6115.03F and 6115.08) It has been supplying water to the two cities comprising the district, the City of Youngstown in Mahoning County and the City of Niles in Trumbull County, and they, in turn, have sold surplus water to areas located outside the district. The constitutionality of the Act was, in 1929, upheld generally notwithstanding claims of violation of due process and equal protection as guaranteed by the federal constitution. *Shook v. Mahoning Valley Sanitary District,* 120 Oh. St. 449. Appeal to this Court was dismissed by appellant, 281 U. S. 770.

A special court of common pleas organized in accordance with the Sanitary District Act by including one judge from Mahoning County and another from Trumbull County, on May 10, 1950 approved a plan denominated "Amendment No. 1 of the Official Plan of The Mahoning Valley Sanitary District." The amendment is designed to augment the supply of water at an estimated cost of $6,000,000. A board of three appraisers was thereupon appointed as required by Ohio R. C. 6115.29 for the purpose of valuing the property needed for rights of way and appraising benefits and damages that would accrue.

The petitioner objected to the appraisers' report as to benefits, which under Ohio R. C. 6115.48 becomes the basis for apportionment of assessments to finance the cost of such a project, on the ground that it failed to assess any benefits against property outside the territorial limits of the original district. The objections did not claim any dep-

rivation of rights based upon the Constitution of the United States (Petition, pp. 5a-8a).

To resolve a difference of opinion between the two judges of the special court in regard to the first report of the appraisers, the Chief Justice of the Supreme Court of Ohio added a judge of the Court of Common Pleas of Belmont County to the panel of the special court. After hearings about which there is no complaint, the disinterested judge, Judge Belt, from Belmont County, stated:

> "The board of appraisers did not include or appraise any outside territory, which failure upon the part of the board of appraisers, raises an inference at least that no outside lands were benefited. The conclusion of the court is that it is useless to do a vain thing. The court believes that under the situation presented, it would be folly to attempt to take in outside territory." (Petition, p. 17a).
>
> "* * * the court has considered the quantity of water sold by the City of Niles to corporations and individuals outside of its corporate boundaries. The court desires to commend the City of Niles for its activities in that respect. In so doing the City of Niles has been made to prosper by reason of having assets outside its corporate boundaries from which it has greatly profited. The same can be said of the City of Youngstown, in an equal degree." (Petition, pp. 18a-19a).

Another of the judges expressed the same view (Petition, p. 24a), and the third concurred "in toto." (Petition, p. 21a). The court did favor shifting a larger share of the cost to Youngstown and this was done by recasting the roll before approval by the final entry.

Accordingly, the special court, all three judges concurring, on March 19, 1953, approved an amended report of the appraisers by a journal entry quoted in the petition at pages 48a to 54a. Up to that time the only item in the

record made by the petitioner with respect to the Constitution of the United States was a general statement directed to an intermediate order which the special court did later set aside—"10. That the order, judgment and decree of the court of jurisdiction is contrary to law in that it contravenes the Constitution of the state of Ohio and the Constitution of the United States of America." (Petition, p. 30a.)

Appeals by several exceptors including the petitioner herein were docketed in the Court of Appeals for Mahoning County but they were, on July 27, 1953, dismissed by that court (Petition, p. 61a), pursuant to a *per curiam* opinion in which the three judges concurred, saying—

> "Thus the legislature has specifically prescribed that the decree of the court is final and incontestable except from an award for compensation or damages. The jurisdictional court has made no award for compensation or damages to any of the appellants, and it follows that there is no right of appeal in these cases now before us, and such appeals, being numbered 3593, 3594, 3595, 3596 and 3597, are hereby dismissed." (Petition, p. 60a.)

The only federal question raised in petitioner's assignments of error to the Court of Appeals was—

> "* * * that the decree of said court deprives this appellant of its property without due process of law and also deprives it of the equal protection of the laws, all in violation of those rights secured to appellant by the Constitution of the state of Ohio and the Constitution of the United States of America." (Petition, pp. 56a, 58a.)

Petitioner then appealed to the Supreme Court of Ohio on a claim to an appeal as a matter of right and also on condition that motions to certify the record be allowed. The appeals as of right were "dismissed for the reason no

debatable constitutional question is involved in said cause." (Petition, p. 90a). On the same day the motions to certify the record were allowed. (Petition, p. 88a.) Thereafter, petitioner filed assignments of error asserting that the decree of the special court deprived it of property without payment of just compensation and also denied to petitioner the equal protection of laws. (Petition, pp. 65a, 67a.) [Petitioner, *in its brief* to the Supreme Court of Ohio, did not make any argument in support of said assignments of error, i.e., it did not argue that either the decision of the special court or the decision of the Court of Appeals deprived it of any rights guaranteed under the state or federal constitutions. As to its right of appeal, it urged only its construction of Ohio statutes.]

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals, holding that the statute did not grant to petitioner a right to appeal from the decree of the special court. The opinion of Judge Stewart begins by saying—

> "The sole question of law presented in the present cases is whether the Court of Appeals was in error in dismissing the appeals of appellants from the judgment of the court of the sanitary district, which judgment overruled the exceptions of appellants to the appraisal of benefits in connection with the expansion program of the sanitary district and confirmed such appraisal." (Petition, p. 71a.)

The points decided by the Supreme Court of Ohio were, to quote from its syllabus *

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* In 11 *Ohio Jurisprudence*, Courts, Section 144, at pages 796-797, it is said:

> "This rule was adopted in January, 1858, and establishes the rule in Ohio that the syllabus of a supreme court decision states the law. Or, as differently expressed, *the points*

(Continued on following page)

"4. Section 6602-65, General Code (Section 6115.36, Revised Code), provides that approval by a sanitary district court of the provisions of a report of a board of appraisers of a sanitary district, as modified and amended, makes the findings and appraisals comprising such report final and incontestable, and Section 6602-66, General Code (Section 6115.37, Revised Code), prohibits an appeal from any part of the decree of such court except an appeal for a jury trial from an award of compensation or damages, or both." (Petition, p. 68a.)

Nevertheless, the petitioner grasped at expressions in Judge Stewart's opinion (Petition, p. 77a) which refer to a provision that had been in the Sanitary District Act from its beginning, Ohio R. C. 6115.41 and its antecedents, and asked the Supreme Court of Ohio for a rehearing on assertion of there being unconstitutional variances in rights to appeal. The application was promptly denied without opinion. (Petition, p. 91a.)

FURTHER REVIEW IS, RESPONDENT SUBMITS, NOT JUSTIFIED.

1. Petitioner's Question "1" Relating to Unilateral Appeal Was Not Timely Raised.

Petitioner admits (Petition, p. 8) that it raised the constitutional question as to "unilateral appeal" for the first time in its application for rehearing before the Su-

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(Continued from preceding page)

decided are found in the syllabus. Matter outside the syllabus is not regarded as decision. * * * Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." (Emphasis, ours.)

This text is supported by Supreme Court of Ohio case-law cited in the footnotes and was recognized in *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 441-442.

preme Court of Ohio after the judgment of the Court of Appeals had been affirmed. It is the settled rule of this Court that federal questions presented for the first time in an application for rehearing before the highest court of the state in which a decision could be had are not timely raised unless the state court actually entertains the petition and expressly passes upon the federal question or unless the question could not have been anticipated. In *Herndon v. Georgia,* 295 U. S. 441, 443, this Court said:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (p. 443.)

While petitioner contends that this question first resulted because of the decision of the Ohio Supreme Court, it is clear that this is not so. Considering the syllabus the court decided only that the exceptors had no right of appeal on the subject matter presented. The question as to whether a board of directors of a sanitary district has any unilateral right to appeal was as inherent in the case at its inception as it is today. The original Sanitary District Act, 108 Ohio Laws, p. 654, Section 37, (as R. C. 6115.41 now does), granted *capacity* to such boards to appeal from orders of courts of common pleas, but in other sections the Act limits *subject matters* that are reviewable and regulates channels of appeal. If there were any constitutional question involved here it would arise from the language of the statute and not from the decision of the Ohio Supreme Court. There being no excuse for petitioner's failure to raise this federal question in a timely manner, this Court cannot be expected to consider it. *American Surety Co. v. Baldwin,* 287 U. S. 156, 163-164.

2. Ohio Supreme Court Did Not Hold That Sanitary Districts Have Unilateral Right of Appeal and Review by This Court Now Would be Premature.

Since "the points decided are found in the syllabus" (*supra*, pp. 5-6), obviously the Supreme Court of Ohio decided that the petitioner did not have a right of appeal on the subject matter presented and did not decide that respondent had a right of appeal on such subject matter. The District had not appealed from the decree of the special sanitary district court. No question concerning its rights of appeal had been presented for decision. The opinions of this Court have stated:

> "We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so." *Adler v. Board of Education*, 342 U. S. 485, 496.

There is no reason to suppose that if the question ever is presented, the Supreme Court of Ohio will hold that the District has a right of appeal on subject matter as to which duly interested opposed parties cannot appeal; and, *a fortiori*, no reason to suppose that it will construe the Act as authorizing any unjustifiable classifications of procedural rights and thereby raise constitutional questions. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546; *Dohany v. Rogers*, 281 U. S. 362, 368-69; *Asbury Hospital v. Cass County*, 326 U. S. 207, 214-215.

If any occasion arises for the Supreme Court of Ohio to consider the appellate rights of a sanitary district, it would be *stare decisis* that parties in the position of the petitioners cannot, under the current Act, appeal from the special sanitary district court directly to a state court of appeals on subject matter like that covered by the appeal in this case. At the present time the question is moot; the

petitioner would not gain a right of appeal contrary to express provisions of the Act by convincing the courts that some one else also should not have appellate rights. In *Massachusetts v. Mellon*, 262 U. S. 447, the opinion of the court states:

> "The party who invokes the power (of the courts to disregard an unconstitutional enactment) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (p. 488, matter in parentheses is ours for context.)

Judge Stewart's dicta, rightly read, do not express an opinion that sanitary districts can appeal directly to a Court of Appeals from any portion of a special court's decree approving a report by a board of appraisers. The appellants, including petitioner, had contended that Ohio G. C. 6602-68 (R. C. 6115.39) authorized their appeal to a Court of Appeals notwithstanding the limitations, prohibitions and regulations of G. C. 6602-65 and 6602-66 (R. C. 6115.36 and 6115.37). The last paragraph of Judge Stewart's opinion (Petition, p. 77a) expresses his view that a special district court's decree approving the report is "final and incontestable except as to an award of compensation or damages." The appeal on these matters is to a court of common pleas for a jury trial whereas districts are, by G. C. 6602-70 (R. C. 6115.41), granted *capacity* to appeal from orders of common pleas courts pursuant to *any section of the entire Act "not requiring* the intervention of a jury." There are many potential situations not dependent upon decrees approving appraisers' reports from which boards might want to appeal. They might want to appeal from the judgments *following* the jury

trials authorized by G. C. 6602-66 (R. C. 6115.37). The General Assembly of Ohio was disposed to grant the necessary capacity.

We have emphasized in the preceding paragraph the distinction between the grant of *capacity* to appeal and authority to carry up particular *subject matter*. If it were not for the grant in G. C. 6602-70 (R. C. 6115.41) to districts of capacity to appeal, it might have been arguable that districts did not have a right to appeal any subject matter at any time as in *Miller v. B. U. C.*, 160 Oh. St. 561 where the court stated:

> "As a general rule an administrative agency has no partisan interests in its decisions. Unless there is express statutory authority therefor, an agency may not appeal from a judgment which, in effect, vacates its decision." (p. 563.)

Accord: *Corn v. Board*, 160 O. S. 9, 19.

Decrees of special sanitary district courts approving reports by boards of appraisers are, of course, within the generality of "any order" under the Act, but the prohibitions upon which Judge Stewart and the Ohio Supreme Court relied were in relation to particular subject matters and would prevail over the general capacity with which the districts are endowed. As Mr. Justice Holmes stated in *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379:

> "The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." (p. 383.)

3. Petitioner's Question "2" Did Not Reach the Supreme Court of Ohio in Form for Review by This Court.

The petition asserts that the decree of the special court assesses the total cost of this improvement against only a portion of the property which will be benefited thereby. (Question "2," Petition, p. 3.) The facts expressed in these conclusions, the petitioner asserts, deprived it of property without due process of law and deprived it of equal protection of the law. The petitioner does not contend that the Sanitary District Act is deficient but only that the appraisers and special court did not follow the petitioner's interpretation of the Act and thereby erred with resulting violation of federal rights. There is no claim of fraud or lack of hearings.

Since the Court of Appeals dismissed petitioner's appeals for want of appealable subject matter, and the propriety thereof has been affirmed by the Supreme Court of Ohio, the opinion and judgment of the special sanitary district court has stood for more than ninety days, for more than sixteen months, without any petition to this Court on federal grounds and even now the petition seeks a writ directed to the Supreme Court of Ohio. It would, therefore, be too late and out-of-place to issue a writ to the special sanitary district court on this assigned ground. (28 U. S. C. § 1257 and § 2101c; *Ohio ex rel. Bryant v. Park District,* 281 U. S. 74, 80-81.)

The merits or lack of merit in these points of the petitioner is immaterial because if the petitioner had no right of appeal, the order of the special court on March 19, 1953 is too venerable for review, and if the petitioner did have a right of appeal within the Ohio hierarchy of courts by virtue of *United States* law, then these points would

have first to be considered by the Ohio appellate courts. When similar questions were tendered in respect to the decision in *Beck v. Drainage District,* 8th C. C. A., 46 F. 2d 632 (annotated in 84 *A. L. R.*, pp. 1098-1110) this Court denied certiorari, 284 U. S. 618.

CONCLUSION.

The state of Ohio, to use language of Mr. Justice Cardozo in the opinion of the court in *Snyder v. Massachusetts,* 291 U. S. 97, 105,

> "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105.)

No such federal question of substance is presented by the record herein. Right of appeal is not guaranteed by the Constitution of the United States. *Ohio ex rel. Bryant v. Park District, supra,* 281 U. S. 74, 80-81. State grounds, legitimate construction of an Ohio statute, are broad enough to sustain the decision.

Whether the respondent has any unilateral rights of appeal and if so, whether the classification is unjustifiable are moot questions which were not raised timely and which this Court need not resolve until presented by a party who would be affected by the answer.

Time for review of the decree of the special sanitary district court in respect to petitioner's point "2" elapsed long ago and is not even sought now. Those matters were not considered by any other Ohio court.

It is respectfully submitted that the petition should be denied.

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